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IN THE

Supreme Court of the United States

October Term, 1969

No. ~~1969~~ 210

RITA RADTKE, Administratrix of the Estate of REINHOLD RADTKE, Deceased, et al.,

Petitioners,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners* pray that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit, made and entered March 7, 1969.

Opinion of Courts Below

This case was originally tried before Judge James C. Connell, of the United States District Court for the Northern District of Ohio, Eastern Division, whose opinion was filed on October 27, 1967. It is published in 276 F. Supp. 163 and has been reprinted as Appendix 1 in the Petition for Writ of Certiorari filed by Alice Marie Lamp administratrix of the estate of Frank Donald Lamp, deceased, et al.

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*This petition is filed on behalf of the following petitioners: Harry Bey and Rita Radtke, Administratrix of the Estate of Reinhold Radtke, Deceased.

An appeal was perfected to the United States Circuit Court for the Sixth Circuit. The judgment of the Circuit Court of Appeals was made and entered on March 7, 1969. The opinion of the Circuit Court which reversed the District Court has not yet been published and is reprinted as Appendix 2 in the Petition for Writ of Certiorari filed by Alice Marie Lamp, administratrix of the estate of Frank Donald Lamp, deceased, et al.

Jurisdiction

Jurisdiction of this Court is invoked under the auspices of 28 U.S.C. 1254(1).

Questions Presented

1. Whether punitive damages may be awarded against a shipowner, for the wanton disregard of the safety of its crew by its master and officers, where the master through his testimony, admits to his following a course of action while employed by said shipowner for thirty years which was a direct violation of published national and international safety regulations and sealanes, and which conduct was the proximate cause of a major marine disaster?

2. Whether it is within the province of a Circuit Court of Appeals to re-examine de novo, the transcribed testimony and exhibits of a District Court so as to determine the weight of this factual testimony under Rule 52(a) F.R.C.P.?

Statutes Involved

1. Title 46 U.S.C. § 688 commonly referred to as the Jones Act.

2. Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*

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Statement of the Case

The petitioners' claims for damages are a result of a ollision between the United States Steel's SS Cedarville nd Den Norske's MV Topdalsfjord in the Straits of Iackinac on May 7, 1965.

The Cedarville sank within approximately forty min-tes after the collision bringing ten members of the crew own with her. In addition, some twenty other crew mem-ers suffered personal injury.

Petitions for exoneration were filed on May 15, 1965 by oth United States Steel Corporation, Den Norske and also y the Hamburg-Amerikalinje as owner of the Weissen-urg, a ship which had been in close proximity to the ollision.

Based on a stipulation signed by counsel for the three wners of the vessels, an order was entered denying the etitions for exoneration from and limitation of liability; ntering judgment for the claimants against United States teel Corporation and Den Norske Amerikalinje and waiv-ng claimant's right to proceed against the owners of the Veissenburg; punitive damages claims to be against the Inited States Steel Corporation alone; and claims for com-ensatory damages to be submitted to a Commissioner, ith claims for punitive damages to be determined by the Court, with a right to review and/or appeal.

The proceedings for compensatory damages have been oncluded, the reports and findings of which may be of ecord by the time this Petition is filed.

The trial for punitive damages, was concluded on June 9, 1967 and on October 27, 1967 Judge Connell filed his pinion, which found United States Steel Corporation liable or punitive damages. On appeal, the United States Circuit Court of Appeals reversed, upon their determina-ion that the findings of the District Court were clearly rroneous.

Reasons for Granting the Writ

1. The underlying theme upon which the Circuit Court of Appeals based its determination was absence of any duty on behalf of the owner to speak or interfere with the authority of the master of the SS Cedarville. This finding is contrary to the finding of this Court in *Spencer Kellogg & Sons* v. *Hicks (The Linseed King)*, 285 U.S. 502.

2. The finding is in conflict with its own determination in *The Cleveco*, Sixth Circuit, 1946, 154 F. (2d) 605 at p. 613.

3. The finding is in conflict with the principle announced by the Fifth Circuit Court of Appeals, in *Avera* v. *Florida Towing Co.*, 1963, 322 F. (2d) 155.

4. The finding is in conflict with the principle announced by the Ninth Circuit Court of Appeals in *State Steamship Co.* v. *United States*, 259 F. (2d) 458.

5. The resolution of the conflict as to the vessel owner's duty to control, where the opportunity to control is immediately present, in this modern day of instant ship-to-shore communication, will vitally affect the entire shipping industry.

6. If the principle of *The Linseed King* is applicable, the owner of the Cedarville is guilty of a culpable wrong which warrants the imposition of exemplary damages.

7. The reweighing of the master's testimony by the Court of Appeals is in conflict with the principles enunciated by the Fifth Circuit in *Frazier III* v. *Alabama Motor Club, Inc.*, 349 F. (2d) 456. *Merry Manufacturing Co.* v. *Barns Tool Co.*, 335 F. (2d) 239.

8. The refusal to accept the findings based on the master's testimony to the Coast Guard is in conflict with the principle announced by the Fifth Circuit in *Cox* v. *Esso Shipping Co.*, 1957, 247 F. (2d) 629; *Fall* v. *Esso Standard Oil Co.*, 1961, 297 F. (2d) 411.

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I.

Punitive damages will be awarded against an employer shipowner for the wanton disregard of the safety of its crew by its master and officers.

The Circuit Court of Appeals in reversing the District Court's decision, stated "that punitive damages are not recoverable against the owner of a vessel for the act of the master unless it can be shown that the owner authorized or ratified the acts of the master either before or after the accident."

At the Coast Guard investigations, Captain Joppich, before an inpaneled board of inquiry testified that the courses he traveled on May 7, 1965, did in fact deviate from those established by the Coast Guard, but *that he had always traveled those courses as a deck officer with the Bradley Fleet for some thirty years because they cleared better, cut the time and distance and were more convenient than the Coast Guard courses* (emphasis added).

In recognizing the shipowner's tacit acceptance of this course of conduct, the District Court, emphatically stated:

> "... The failure to speak evinces a conscious acquiescence to the acts of the agent.
>
> Acquiescence to the known tortious acts of its agent by the corporate principal is tantamount to a ratification of those acts, making the corporation particeps criminis in the unlawful or tortious misconduct of its agent."

In *General Motors Acceptance Corp.* v. *Froelich,* 273 F. (2d) 92, (D.C. Cir. 1959), where defendants contended that since there was no express authority by the corporations' executive officers, no punitive damages should be awarded, the Court completely disregarded this argument and held:

> "... It is not essential in every case that an executive officer of high rank actively participate in the corporate conduct ... A corporation such as defend-

> ant, with offices in a number of cities and engaged in widespread activities, necessarily delegates authority to its agents to be used on its behalf. If these agents in the exercise of their delegated authority, acting through regular corporate channels, engage in conduct, which except for the corporate nature of their principal, makes out a case for punitive damages, the corporation is not shielded therefrom simply by the absence of explicit authorization or ratification of the particular conduct . . ."

This decision is in accord with the Restatement of Torts which provides:

> § 909 Punitive Damages Against An Employer.
> "Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> . . . (d) the employer or a manager of the employer ratified or approved the act."

There is no question, but that silent acquiescence to a course of conduct over a period of time will be deemed a ratification of those acts. (10 Fletcher, Cycl., Corporations, Rev. ed. 1961; *General Motors Acceptance Corp.* v. *Froelich*, supra; *Railway Co.* v. *Prentice*, 147 U.S. 101, 109, 13 Sup. Ct. 261).

Therefore, when the above principal of law is examined together with Captain Joppich's testimony the liability of the shipowner for punitive damages, becomes clear.

II.

The Court of Appeals erred in reviewing *de novo* and in setting aside the findings of fact by the District Court.

It was Judge Connell's opinion in the lower court, that from the testimony given by Captain Joppich, it could

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readily be found that he always traveled at full speed in fog and that the other vessels of the Bradley Fleet habitually violated Rule 15 and deviated from the Coast Guard causes. 276 F. Supp. 161, 181-189.

The Court of Appeals, however, in reversing this decision held that the only significant evidence in support of these findings of the general practice of deviation were the self-serving statements of Captain Joppich and they could not therefore be affirmed under Rule 52(a), F.R.C.P.

In going a step further, they held that since there was no probative evidence to show that U.S. Steel Corporation ordered the violations, the corporate entity could not be liable in exemplary damages for the single act of its agent.

A self-serving declaration has been defined as one made by a *party* in his own interest at some time and place out of Court, *but does not include testimony which he gives as a witness at the trial* (*Glanson Co.* v. *United States,* 166 F. Supp. 955, 958 [U.S. Customs Court, 1958], (emphasis added).

According to Black's Law Dictionary Third Edition, p. 531,

> "Self-serving declarations, are those '. . . made by a party in his own interest at some time and place out of Court;—not including testimony which he gives as witness at the trial.' "

Keeping the above in mind, it is inconceivable, how the testimony of Captain Joppich, who is not even a party to this action, can possibly be considered to be a self-serving declaration.

The general rule concerning the scope of review is that the Court of Appeals is bound by the factual findings of the lower court, and unless clearly erroneous, is not free to reweigh the evidence presented to the lower court. (*Alster* v. *Alster & Associates, Inc.,* C.A. Ill., 1963, 319 F.

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(2d) 54; *U.S.* v. *Rabin, C.A. Ill.*, 1963, 316 F. (2d) 564, cert. denied 84 Sup. Ct. 48, 375 U.S. 815; *Eastmount Const. Co.*, v. *Transport Mfg. & Equipment Co.*, C.A. Mo. 1962, 301 F. (2d) 34).

There appears to be some deviation from this general rule, in (*Frazier III* v. *Alabama Motor Club, Inc.*, 349 F.(2d) 456, 458 (Fifth Cir. 1966)), which held that on a submitted record of a single deposition, and in the absence of any issue of credibility the record can be reviewed on appeal. However, (*Merry Manufacturing Co.* v. *Burns Tool Co.*, 335 F. (2d) 239, (Fifth Cir. 1964)) held that it was not the function of the appellate court to reweigh the credibility of witnesses on appeal from a controverted record.

Thus, in comparing the prior holdings of the Fifth Circuit with that of the case at bar, the conflict becomes apparent in that the Sixth Circuit by categorizing Captain Joppich's testimony as self-serving is in effect weighing de novo the probative value of the evidence presented in the lower court.

Conclusion

The issues at stake in this case are important to the entire maritime industry. There has long been a need, in these days of instant radio and telegraphic communication, to overhaul the rules relating to the scope of authority of the master of a vessel. This is particularly so in regard to the great lakes operations because of the geographical confines of the area and the regularity of the routes.

There is, however, at issue the broader question of the degree to which corporate enterprises may escape responsibility for the reckless or willful conduct of agents and employees. We find ourselves well into an era wherein the general public seems to be at the mercy of gigantic enterprises whose activities and practices dominate our

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lives. There is a great need to protect the public from corporate conduct which recklessly endangers and injures members of society. The costs of reparations for negligently inflicted injuries are predictable enough so that they can be calculated in advance and a decision made to accept the risk if the potential money advantage exceeds the potential liability. The application of punitive damages is the single most effective weapon remaining to the Courts to force large corporate enterprises to exercise proper control over their agents and employees.

Respectfully submitted,

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